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Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE COASTAL STATES ORGANIZATION, THE STATES OF CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, NEW YORK, NORTH CAROLINA, OREGON, SOUTH CAROLINA, AND WASHINGTON, AND THE BAY CONSERVATION DEVELOPMENT COMMISSION AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

Amici curiae, the Coastal States Organization as well as eleven individual states and the Bay Conservation De-

velopment Commission, submit this brief in support of respondents, the State of California, *et al.* The Coastal States Organization participated as amicus in the proceedings below, and counsel for all parties have given their consent to the filing of this brief.

The Coastal States Organization was established in 1969, three years prior to enactment of the Coastal Zone Management Act (CZMA). Its purpose is to provide the United States' coastal governors with a means to participate on a multi-state basis in the resolution of nationally significant coastal issues, to collectively advocate the responsible development and management of shared federal-state marine and shoreline resources, and to represent its member states' unique coastal interests before Congress and in other public policy forums.

The organization's membership consists of delegates who are appointed by the governors of 33 states, commonwealths and territories having an ocean, gulf or great lakes boundary. The delegates are their governors' official spokesmen on a wide range of state coastal issues such as natural resource protection and development, coastal zone management, ocean sciences, and related legislative and regulatory matters.

The Organization played a lead role in legislative efforts at the federal level leading to enactment of the CZMA (with representatives of the Organization testifying at all congressional hearings on the original Act and on the 1976 and 1980 amendments). The Organization has also participated extensively in congressional hearings on other environmental and marine-related legislation, including the Deepwater Ports Act in 1976 and amendments to the Clean Water Act.[1]

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[1] The Organization has sponsored national conferences on legislative proposals and other matters affecting coastal zone management. These have included conferences on revised legislative authority for the National Oceanic and Atmospheric Administration (NOAA), and on the 1980 amendments to the CZMA.

The Coastal States Organization also successfully represented the interests of its member states during the efforts by the federal government in 1981 to redefine the very issue of "consistency" being set forth in the arguments by the petitioners. The Department of Commerce proposed, then withdrew, because of congressional and coastal state opposition, regulations that would have prevented states from participating in the pre-lease stages of federal offshore oil drilling activities and decisions.

The interest of amici in this litigation is readily apparent. All of the states and territories in the Organization are coastal states or territories within the meaning of the CZMA. Twenty-eight of these states and territories have already developed and received federal approval for their coastal state management programs, including the eleven states appearing as amici here. The states and territories have undertaken these efforts with the legitimate expectation that they would exercise primary responsibility for management of the coastal zone and that the federal government would make its activities consistent with their programs, as contemplated by Section 307(c)(1). As the pace of federal offshore leasing increases, it is therefore essential that the right of the coastal states under the CZMA be respected.

SUMMARY OF ARGUMENT

The Court of Appeals in this case held that Section 307(c)(1) of the Coastal Zone Management Act requires the Secretary of the Interior to make the selection of tracts for leasing on the Outer Continental Shelf, and the award of leases thereon, consistent with state coastal zone management plans to the maximum extent practicable. That decision is correct for several reasons.

1. The CZMA, and Section 307(c)(1) in particular, reflect a congressionally-developed bargain designed to assure that state coastal zones are managed in accordance

with national interests. In return for the states' agreement to adopt coastal zone management programs embodying federal interests as well as federal procedures, the federal agencies, in turn, agreed to respect these programs while conducting activities directly affecting the coastal zone. The legislative history of the CZMA, both at the time of its passage and thereafter, emphasizes the importance of the federal obligation, making clear that it applies regardless of where the activities originate. Congress has also expressed its desire that federal agencies begin to take the coastal plans into account as soon as practicable, when the greatest benefits from federal review are still attainable. Pages 8-14, *infra*.

2. The selection and leasing of tracts is, in practical terms, the last stage at which the Secretary has a guiding role in the development process. After tracts have been selected and leased, the Secretary can no longer change the mix of tracts to be sold, properly account for the cumulative effects of overall development, or include stipulations in the leases themselves. Thus, if the Secretary is to give proper attention to state programs, he must do so before the leases are transferred. While the information at that time is not complete, it is more than sufficient to conduct the *initial* stage of what all parties concede to be a phased process of review. Pages 14-20, *infra*.

3. Neither the 1953 Tidelands Oil Compromise, nor Section 19 of the Outer Continental Shelf Lands Act, nor Section 307(c)(3)(B) of the CZMA is to the contrary. The coastal states do not seek to undermine federal ownership of the OCS, as embodied in the 1953 Compromise. Rather, they seek to carry out the responsibilities conferred on them by Congress in Section 307(c)(1) of the CZMA, responsibilities that are supplemented, not supplanted, by the provisions of Section 19 and Section 307(c)(3)(B). Pages 20-30, *infra*.

ARGUMENT

This case presents the question whether the selection and transfer of tracts for development on the Outer Continental Shelf (OCS) is a federal activity directly affecting the adjacent coastal zone, within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1456. While the statement of the issue is perhaps unavoidably dry, its resolution will nevertheless have a profound effect on the ability of coastal states to meet the obligations set forth in the CZMA and embodied in their own coastal zone management programs. According to petitioners, the Secretary of Interior may select tracts and transfer leases to private oil companies without any regard to CZMA requirements, despite the fact that Congress intended the CZMA to be a cooperative program between the coastal states and the federal government and the fact that the sale of leases is the last stage at which any meaningful cooperation between the affected states and the federal government can be achieved. In our view, to permit such disregard would defeat the central purpose of the CZMA.

It is important to understand that the issue here is not *whether* the CZMA is applicable to development of oil and gas resources on the OCS but *when* it becomes so. Even petitioners recognize that the CZMA at some point requires state coastal programs to be taken into account. *See* U.S. Br. 21, 43; WOGA Br. 27-29. Petitioners simply would prefer that attention to the CZMA be paid later rather than sooner, after the federal government has passed control over the leased tracts to the oil companies rather than before. As we discuss below, however, that preference is directly contrary to the intent of Congress, which has made quite clear that consideration of state plans should begin as soon as possible rather than on a belated, haphazard basis.

I. Congress Intended That Section 307(c)(1) of the CZMA Be Applied to the Sale of OCS Leases By the Federal Government

Because it is hornbook law that construction of a statute begins, and sometimes ends, with its language, petitioners make an industrious effort to divine a plain meaning in the phrase "directly affecting." But the term "directly," to which most of the attention is paid, "is not a word of art, defined and limited; like most words in the English language it has multiple meanings depending upon the context in which it is used." *Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 951 (5th Cir. 1979).[2] The proper inquiry, therefore, is not what the term means in the abstract but whether particular situations are meant to be covered by it. Here, the question is whether the transfer of leases is the sort of activity for which Congress wanted a consistency review.

The language of Section 307(c)(1), standing alone, provides no inescapable answer. In choosing the language of the section, Congress did not identify OCS lease sales or any other particular federal activity as being within or without the terms of the statute. Rather, without further specification, it simply required that federal activities "directly affecting" the coastal zone be made consistent to the maximum extent practicable with state coastal plans. Although it contains no express exceptions, the term "directly affecting" gives little guidance about what federal activities have a sufficient impact on the coastal zone to fall within its requirements.

The legislative history does not explain why Congress chose this particular term. Although both the House and

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[2] It is worth noting that, although the Secretary seems to believe that one of the meanings of "directly" is "physically," U.S. Br. 21, the dictionary contains no such definition. *See* Webster's Third New International Dictionary Unabridged 640 (3d ed. 1971).

Senate versions of Section 307(c)(1) applied only to federal activities *in* the coastal zone, the language was changed in conference to its present form. H.R. Rep. No. 1544, 92d Cong., 2d Sess. 7, 14 (1972) (Conference Report), *reprinted in* Congressional Research Service, Library of Congress, 94th Cong., 2d Sess., *Legislative History of the Coastal Zone Management Act of 1972, as amended in 1974 and 1976* (Comm. Print 1976). At the same time, Congress incorporated into the CZMA a definition of the coastal zone that excludes all federal lands. The conferees did not specifically address the scope of the term "directly affecting."[3]

The lack of precise definition in the language and legislative history, however, does not mean that the search for meaning is bootless. For, "[a]s in all cases of statutory construction, our task is to interpret the words of th[is] statute[] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). Viewed in those terms, the inquiry is more rewarding. To begin with, of course, Section 307(c)(1) is part of a statute whose origin and purpose are well-established. Moreover, both at the time of its passage and later, Congress has specifically addressed the purpose and scope of Section 307(c)(1) itself. These materials demonstrate quite plainly that Congress did not intend the Secretary, in selecting and awarding tracts for development, to turn a blind eye to state coastal plans.

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[3] Nothing in the legislative history supports petitioners' assertion that the term "directly affecting" was meant to address only federal lands within the coastal zone. Indeed, in explaining the precise definition of the coastal zone, the Conference Report noted that federal interests in a number of areas, including the Outer Continental Shelf, were unaffected by its definition of the coastal zone. *Id.* at 12. "As to the use of such lands which would affect a state's coastal zone," the conferees concluded, "the provisions of section 307(c) would apply." *Ibid.* See also pages 11-12, *infra*.

A. The Coastal Zone Management Act

Although this case at first glance might seem like a dispute between national and local concerns, the fact is otherwise. For it is clear that, in enacting the CZMA, Congress intended to serve *national* objectives. The congressional findings, for example, expressly recognize that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress further declared that "it is the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1).

To serve this interest, Congress gave to the coastal states the primary responsibility for management of the coastal zone. Congress specifically found that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the *states* to exercise their full authority over the lands and waters in the coastal zone . . . ." 16 U.S.C. § 1451(i) (emphasis added). The Senate Committee in its report on the 1972 Act pointed out that the states are to be "the focal point for developing comprehensive plans and implementing management programs for the coastal zone." S. Rep. No. 753, 92d Cong., 2d Sess. 5 (1972). The House Committee agreed, observing that " 'states must assume primary responsibility for assuring that the public interest is served in the multiple use of land and water in the coastal zone.' " H.R. Rep. No. 1049, 92d Cong., 2d Sess. 10 (1972).[4]

If the CZMA had simply confirmed state authority over the coastal zone, however, it would have been largely unnecessary. Under the terms of the "1953 Compromise," upon which WOGA greatly relies, the states al-

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[4] A principal policy of the CZMA, as finally enacted, is "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone . . ." 16 U.S.C. § 1452(2).

ready possessed the authority to "manage, administer, lease, develop and use" the lands and natural resources in the coastal zone. 43 U.S.C. § 1311(a). What the states lacked, and what Congress gave them in the CZMA, was influence over the development of federal lands or resources, such as federally-owned oil and gas resources on the Outer Continental Shelf, with critical consequences for management of the coastal zone. The CZMA thus represents a carefully-considered bargain in which the states agreed to develop coastal plans in accordance with federal procedures and standards in return for an agreement that federal activities directly affecting the coastal zone would be made consistent with those plans to the maximum extent practicable.

The provisions of the CZMA reflect that bargain in considerable detail. To begin with, the statute specifies the areas of concern that must be addressed in a state management plan. *See* 16 U.S.C. § 1454(b). In particular, every state plan must include "[a] planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including but not limited to, a process for anticipating and managing the impacts from such facilities." 16 U.S.C. § 1454(b)(8). Furthermore, state programs must take account of the possible tension between management of the coastal zone and the national interest in expedited production of oil and gas. If it is to receive approval, a program must provide for "adequate consideration of the national interest in planning for, and in the siting of, facilities (including facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature." 16 U.S.C. § 1455(c)(8). No state plan, therefore, may be put into place if it shortchanges national energy needs in the interest of local concerns.[5]

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[5] Indeed, petitioner WOGA and various oil companies challenged the very coastal zone management plan at issue here on the ground, *inter alia*, that it failed to take account of national interests in the

The Act also contains a gauntlet of federal review to assure that the programs in fact meet the statutory standards. As a first step, in preparing their programs, the coastal states must solicit and consider the comments of all federal agencies with jurisdiction over activities that might affect the coastal zone. 15 CFR § 923.51 (d) (1-5). The final programs, as submitted, then must specifically address the comments from such agencies regarding "the national interest in the planning for or siting of facilities which are more than local in nature." 15 CFR § 923.51 (d) (5) (ii). Subsequently, when the programs are reviewed by the Department of Commerce for approval and adoption, the federal agencies are again given full opportunity to comment upon, criticize, and insist on changes in any part of the states' coastal zone programs. *See* 15 CFR § 923.72.

Having assured that state plans adhere to federal standards, and address federal concerns, Congress in return guaranteed to the states that the objectives embodied in the plans would not be disregarded. The linchpin of this commitment is the statutory requirement of federal consistency provided in Sections 307 (c) (1) and (c) (2), 16 U.S.C. § 1456 (c) (1)-(2). By committing federal agencies to act in a manner consistent with the state programs, Congress assured participating coastal states that their management of the coastal zone would not be frustrated by conflicting federal action. This assurance, of

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development of offshore oil and gas resources. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Both the District Court, 456 F.Supp. at 922-27, and the Court of Appeals, 609 F.2d at 1313-15, conclusively rejected WOGA's claims, affirming the administrative determination that California's plan struck an equitable balance between national and state interests in energy development. State plans typically address issues arising from lease sales in considerable detail. *See, e.g.*, U.S. Department of Commerce, *State of Connecticut Coastal Management Program and Final Environmental Impact Statement* at II-230.

course, is directly contrary to the business-as-usual claims made by petitioners in this case.

The views of Congress on the importance of federal consistency are hardly enigmatic. At the time of passage, Congress expressed its clear intent that federal agencies conform their activities to approved state management plans. The Senate Report notes that "[i]nasmuch as Federal agencies are given a full opportunity to participate in the planning process, the committee deems it essential that Federal agencies administer their programs . . . consistent with the State's coastal zone management program." S. Rep. No. 753, 92d Cong., 2d Sess. (1972), *reprinted in CZMA Legislative History*, *supra*, at 240. The Senate Committee report on the 1976 amendments states that the consistency section "assures that once state coastal zone management programs are approved and a rational management system for protecting, preserving, and developing of the States' Coastal Zone is in place. . . , *the Federal departments, agencies, and instrumentalities will not violate such systems. . . .*" S. Rep. No. 277, 94th Cong., 1st Sess. 37-38 (1975) (emphasis added). Indeed, the Committee specifically noted the "leverage [participating coastal states] will gain over federal activities affecting the coastal zone," saying that such leverage would be "a powerful incentive for completion of the state program development process." *Id.* at 20. Similarly, the House Committee report stated that "[t]his [consistency] provision of the original act is one of the principal incentives for the states and local governments to take part in the Coastal Zone Management Program." H.R. Rep. No. 878, 94th Cong., 2d Sess. 53 (1976).

Although petitioners emphasize again and again that the activities at issue here take place on federal property, that fact is essentially irrelevant. In addressing the requirement of federal consistency, Congress has made clear that the federal government may not evade its obligations by pointing to the site rather than the effect of its activities. The 1971 Senate Report, while explaining

the intent of Congress concerning the federal activities to be subject to Section 307(c)(1), stated unequivocally:

> It is intended that any lands or waters under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering federal agency determines them to have a functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone, should be administered consistent with approved state management programs.

S. Rep. No. 526, 92d Cong., 1st Sess. 30 (1971).[6] Similarly, Congress listed as one of the aims of the statute the encouragement of cooperation between the coastal states and federal agencies "engaged in programs affecting the coastal zone." 16 U.S.C. § 1452(c) (as amended, 16 U.S.C. § 1452(4)). As we have noted (page 9 *supra*), state management programs must include adequate consideration of plans for energy facilities "which significantly affect" the coastal zone, 16 U.S.C. § 1455(c)(8), and grants are provided for activities relating to energy facilities "which significantly affect" the coastal zone. 16 U.S.C. § 1456a(a)(1)(B). It is unmistakable, therefore, that Congress has taken a practical, rather than a geographic, view of the scope of Section 307(c)(1).

In recent years, Congress has been even more explicit about the scope and intent of Section 307(c)(1). In 1980, while specifically addressing the question whether the term "directly affecting" applied to the sale of OCS

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[6] This legislative history effectively defeats the notion, advanced by the Secretary, that the term "directly affecting" requires some immediate "physical impact." *See* U.S. Br. 21. It also defeats the idea that Congress intended Section 307(c)(1) to apply only to "those activities on federal lands within the confines of a state's coastal zone." U.S. Br. 24. That view, in fact, was again rejected when Congress was considering the 1976 amendments to the CZMA. The relevant Senate report noted that Section 307(c)(1) included "activities *in or out of* the coastal zone which affect that area." S. Rep. No. 277, 94th Cong., 1st Sess. 36-37 (1975) (emphasis added).

leases, the relevant House Committee Report emphasized that consideration of state coastal plans should begin "at the earliest practicable time." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). The Committee then went on to suggest that federal activities directly affect the coastal zone whenever they have "a functional interrelationship from an economic, geographic or social standpoint with a state coastal program's land or water use policies," *ibid.*, a formulation that openly echoes the language from the 1971 Senate Report. Alternatively, the Committee indicated that Section 307(c)(1) should apply "when a federal agency initiates a series of events of coastal management consequences." *Ibid.* The relevant Senate report likewise pointed out the importance of timely review, noting that "[a]s a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).[7]

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[7] The Report stressed that "[c]oordination must *continue* during the critical exploration, development, and production stages," *id.* at 11, lending further weight to the idea that review is a continuing process beginning with the leasing stage itself.

Although we recognize the hazards of relying on subsequent legislative history, *see Andrus v. Shell Oil Co.*, 445 U.S. 657, 667-68 (1980), the 1980 materials possess two virtues altogether lacking in the reports relied upon by petitioners. *See* WOGA Br. 31-33, 40-44; U.S. Br. 28-38, 40. First, they address precisely the question and provision here at issue, and do not depend, as do petitioners' tenuous arguments based upon Section 307(c)(3)(B) and Section 19 of the OCSLA, upon inferences derived from what Congress failed to do or say. *See* pages 24-30, *infra*. Second, the understanding of the effect of Section 307(c)(1) expressed by Congress in 1980 carries out the purposes of the statute as amended by Congress that year. Following extensive review of the CZMA, Congress amended the statute to re-emphasize as one of its purposes the importance of "encourag[ing] the participation and cooperation of the public, state and local governments . . . as well as of the Federal agencies having programs affecting the coastal zone. . . ." Pub. L. No. 96-464, § 3, 94 Stat. 2060 (1980), *codified at* 16 U.S.C. § 1452(4). The House

Although the Secretary is plainly unhappy with his end of the bargain, the fact is that Congress has never wavered from its intention to make federal agencies conform their programs, to the maximum extent practicable, to the state plans. From the very beginning, Congress has sought cooperation from federal agencies "engaged in programs affecting the coastal zone," and in more recent years it has made pointed reference to its wish to get the process moving "at the earliest practicable time." Not once, either at the time of passage of the CZMA or at any later time, has Congress ever said that it wished to exempt from Section 307(c)(1) either activities on the Outer Continental Shelf generally or lease sales in particular. As we discuss below, such an exemption would clearly undercut the balance that Congress established in the CZMA.

B. The Leasing Stage

It is important, at the outset, to recognize that few, if any, federal programs have a greater impact on the coastal zone than oil and gas leasing on the Outer Continental Shelf. Offshore oil and gas operations present unique problems of equipment and transportation and unusual perils to the fragile ecostructure of the coastal zone. It is obvious, therefore, that, if the CZMA is to mean anything at all, leasing activities must be squared at some point with management plans for the coastal zone. Moreover, given the magnitude of the possible effects and the importance of rational planning to accommodate them, it is logical to assume that Congress intended review to occur at the earliest possible phase, when, as the Court of Appeals found, "the basic scope and charter for subsequent development and production" is established. U.S. Pet. App. 13a.

Petitioners take the view, however, that the selection of tracts, and the award of leases, are events of little

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Report expressly stated that Congress intended this goal to be effected through a broad construction of Section 307(c)(1). H.R. Rep. No. 1012, 96th Cong., 2d Sess. 35 (1980).

consequence, which create no need for attention to state coastal plans. Nothing could be further from the truth. At the very least, the sale of a lease changes a tract *protected* from development into one *slated* for development, a change of signal importance to those charged with accommodating the effects of development. On land, when an open space is sold for residential or industrial development, the adjacent landowner need not see the first blocks of granite to know that his property has been seriously affected. The same is true of planned development on the Outer Continental Shelf: once a tract has been awarded, its character as a protected area has been lost. It makes little sense for that change to take place without any regard for the requirements of state coastal plans.[8]

The award of leases also marks a radical change in the role of the federal government. After the lessees have invested millions of dollars to acquire the tracts, they, and not the federal government, are primarily responsible for all subsequent activities.[9] It is the lessees, and not

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[8] The sale of a lease authorizes the lessee to conduct preliminary activities on the tract *without* any further approval by the federal government. Those activities are defined by regulation to include "geological, geophysical, and other surveys necessary to develop a comprehensive exploration plan." 30 C.F.R. § 250.34-1. Lessees are allowed to penetrate the seabed up to 300 feet in unconsolidated formations and 50 feet in consolidated formations. The regulations even allow for an adverse impact on OCS natural resources so long as it is not "significant." *Ibid.* Indeed, the Secretary seems to concede the existence of some "direct effects" from a lease sale itself, though he characterizes them as "extremely limited." U.S. Br. 29.

[9] Once the decision to sell particular tracts has been made, the state has no alternative but to consider the changed status of a tract in making decisions about nearby coastal areas. As petitioners point out, exploration on some tracts may be delayed for several years, after which the tracts may be explored and developed on a haphazard basis. U.S. Br. 43-45 & n.37; WOGA Br. 28 & n.23. If the state must wait for this lengthy and random process to evolve before learning how development may be shaped to accommodate its plan, the state will be forced to manage its coastal area with needless uncertainty.

the government, who decide what tracts are to be developed and when development shall start; it is the lessees, and not the government, who draw up the plans for exploration and development, including the specifications for drilling and related equipment; it is the lessees, and not the government, who choose how any resources shall be transported and how to protect against spills and other damage. Although the government may disapprove these plans in certain instances, it plays an essentially passive role. The lease-sale stage, therefore, is the *last* stage at which the federal government has anything approaching full control over the course of development on the Shelf.

This control is of more than cosmetic importance. For example, as the Court of Appeals noted, the leasing stage is the only opportunity to review the cumulative impacts of oil and gas development on the coastal zone. U.S. Pet. App. 13a. With regard to management of the coastal zone, of course, it would be a pyrrhic victory for the states to achieve consistency on individual tracts while the total effects of development nonetheless caused significant damage to the environment. Yet, at later stages, after the leases have passed into the hands of the lessees, consistency determinations can be made only on a tract-by-tract basis under Section 307(c)(3)(B).

The leasing stage is also the only opportunity for the federal government to consider state plans in deciding how many and what parcels within an area are to be developed.[10] Because the federal government controls not

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[10] While the Secretary says that any effects on the coastal zone "do not stem from issuance of a lease, but from subsequent federal approval of exploration, development and production plans," U.S. Br. 22, that analysis is too superficial. In the end, any development results from a series of decisions beginning with tract selection and the award of leases proceeding through initial exploration and culminating in actual production and transportation. Not only is each stage a prerequisite to the next, but the selection of tracts is a uniquely important step, for no activity at all can occur on a tract unless the Secretary designates it for lease.

only the tracts selected for development but the tracts not selected, it can revise the leasing program to assure the least possible adverse effects on the coastal zone. By the same token, review at the lease stage gives the Secretary a chance to identify appropriate stipulations for inclusion in various leases. The stipulations can, of course, then be modified to reflect any additional information as exploration and development proceed.[11]

These benefits cannot be assured through later review of the exploration and development plans of the individual lessees, whatever information the lessees may provide. Although the lessees are required to conform their individual proposals to state plans, they can neither plan for nor control the overall effects of leasing in the coastal area. Nor can the individual lessees make changes in the tract selection or bind their competitors as well as themselves to necessary restrictions. The individual lessees also have no special obligation to balance development with environmental concerns, as the federal government does. *See* 43 U.S.C. § 1802(2)(B).

The thrust of petitioners' argument, however, is not that early review is inappropriate, but that it is impossible. They insist that the Secretary cannot make a consistency determination at the lease-sale stage, saying that the available information will not allow for resolution of all possible uncertainties. *See* WOGA Br. 30, 45; U.S. Br. 43-45. That argument is faulty on several grounds. First of all, it simply misses the point. The consistency review under Section 307(c)(1) is not intended to be the

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[11] It is obviously preferable for all concerned to have these conditions specified at the outset, when they can be weighed in the bidding decision, rather than to allow them to become a needless point of controversy after a lease has been awarded. In addition, the use of generic stipulations promotes fairness among the potential lessees, since stipulations proposed at the outset can be applied fairly and uniformly to all lessees. If review is delayed, the effect of necessary restrictions may fall more harshly on the lessees who seek approval of exploration and development plans after the plans of others have been approved without restrictions.

only review, or the final review, but merely the first of a series of reviews concededly envisioned by the CZMA. To be sure, review at the lease sale stage could not be expected or intended to resolve every contingency related to the ultimate development of offshore oil resources, just as review at the exploration stage cannot settle all possible questions regarding development. Rather, as the regulations implementing Section 307(c) clearly indicate, the Secretary would be called upon to conduct a review "in phases based upon developing information, with each subsequent phase subject to Federal agency discretion. . . ." 15 C.F.R. § 930.37(c) (1983).

In any event, petitioners improperly belittle the information that in fact exists when tracts are selected for lease. To begin with, the Secretary must prepare a comprehensive environmental impact statement prior to the final selection of tracts for leasing. 42 U.S.C. § 4332 (2)(c). The EIS will necessarily contain comprehensive information about environmental conditions in the affected area, including conditions within the coastal zone, as well as certain information about the prospects for oil and gas development on the tracts. The Department of Interior may supplement this information with data from a variety of tests short of actual drilling, receive data from tests conducted by potential lessees, and study data generated by exploration and development in related areas. *See* 43 U.S.C. § 1352.

While obviously not definitive, the data are used for numerous significant purposes. Most importantly, of course, the data are considered sufficient for the Secretary to make the very decision in question here: the choice of tracts for lease. In addition, the Secretary uses such information to determine matters of profound importance to the state's coastal zone, including the timing of the sale and any stipulations to which the leases would be subject. As the Court of Appeals noted, "[t]hese choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of coastal

zone will be subject to danger, the flow of vessel traffic, and the siting of on-shore construction." U.S. Pet. App. 13a.[12]

In other circumstances, the Secretary has used the information available to him at the leasing stage to take precisely the sort of actions that would ordinarily flow from a consistency review at that stage. In Lease Sale 48, for example, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel at the lease-sale stage for reasons similar to the environmental concerns embodied in California's approved state management plan. Letter from Secretary Andrus to Governor Brown (June 29, 1979). In addition, the Secretary has frequently imposed stipulations on proposed leases to substantially reduce adverse coastal impacts. *See* Solicitor's Opinion (October 1979), C.P. 3, Cal. Exh. L-11, at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978); *North Slope Borough v. Andrus*, 642 F.2d 589, 595-97 (D.C. Cir. 1980.)

We also note that, where it has suited a different purpose, the oil companies have made much of the detailed information collected prior to a lease sale. Just four years ago, the Assistant General Manager of WOGA attested "to very substantial contributions in time and money made by the engineers, environmental experts and scientists of member companies." Affidavit of Robert N. Harrison, filed June 25, 1979, in *Energy Action Educational Foundation v. Andrus*, No. 79-1633 (D.D.C.). According to this WOGA official, prior to bidding on leases, member companies "have participated in intense geological and

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[12] In addition, the information provides the only real basis for determining whether bids are sufficient. Because the Secretary has the authority to refuse bids, and is required by the OCSLA to assure receipt of fair market value for the leased tracts, 43 U.S.C. § 1344(a)(4); *see generally Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), the information available before the lease sale plays an essential part in determining whether that requirement is met.

engineering evaluations of the proposed lease tracts" that include "seismic and other geophysical surveys, bottom sampling, core holes, geological field work, engineering analysis of sea floor conditions, accumulations of cost data relative to drilling, platform construction and pipeline construction, and many other activities needed for evaluation of tracts." *Ibid.*

This sort of information is more than adequate for a meaningful first step in the review process. While the Government suggests that the coastal states would demand consistency at the lease-sale stage for every conceivable contingency, that fear is wildly overstated. The principal concern of the coastal states is, rather, to assure that the government does not initiate development of tracts when it is apparent, in light of the known conditions and the available technology, that development *cannot* be made consistent with the state plan even with adequate stipulations. Moreover, even when the inconsistency is not "incurable" or may disappear as further information is acquired, it makes sense for the federal government to take all practicable measures to see that the lessees are aware of these concerns before the leases are awarded. Such notice, in fact, should reduce unnecessary friction as exploration and development proceeds.

In short, an initial consistency review at the lease-sale stage is both possible and necessary to serve the purposes of Section 307(c)(1). *See Conservation Law Foundation v. Watt*, No. 83-0506 (D.Mass. March 28, 1983), Slip Op. at 40. Petitioners have simply confused an unwillingness to carry out that review with an inability to do so.[18]

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[18] The authority to revoke leases after they have been awarded is a poor substitute for early review. In the first place, despite the Sectary's suggestions, *see* U.S. Br. 30, the revocation of a lease is a slow and costly process that can only occur in very narrowly defined circumstances, following a hearing. *See* 43 U.S.C. § 1334(a)(2)(A). Moreover, it strains credulity to suppose that financial and political considerations will not color a decision on the merits once lessees have paid millions of dollars for a particular tract that may be the

II. The Other Statutory Provisions Relied on by Petitioners Do Not Relieve the Federal Government of Its Obligations Under Section 307(c)(1)

Although petitioners do give passing attention to Section 307(c)(1), they have been unable to discover any language or any legislative history, contemporaneous or subsequent, that exempts lease sales from the requirements of that section. To compensate, therefore, petitioners devote much of their briefs to statutory provisions other than the one actually at issue here. In their efforts to cut down the obligations of the federal government under Section 307(c)(1), they range from the 1953 Tidelands Oil Compromise to the Outer Continental Shelf Lands Act Amendments (OCSLAA) to Section 307(c)(3)(B) of the CZMA. None of these provisions is helpful to their cause.

A. The Tidelands Oil Compromise

While petitioners stoutly maintain that the CZMA does not disturb the "1953 Compromise" allocating ownership of submerged offshore lands among the states and the federal government, no one has said that it does. The federal government is free to conduct activities on the Outer Continental Shelf and to derive revenues and other benefits from them. But Congress has recognized that, in doing so, the federal government may cause effects not just on the OCS, over which it has authority, but on the coastal zone as well, over which the states have authority. In that case, Congress provided in Section 307(c)(1) that the federal activities be made consistent with state coastal plans to the maximum extent practicable.

Despite their repeated invocations of the "1953 Compromise," petitioners also fail to note or appreciate that the compromise confirming federal authority over natural resources on the Outer Continental Shelf at the same

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subject of dispute. Finally, despite the Secretary's argument, we note that WOGA is eloquently mum on this subject.

time confirmed the states' authority to manage and to plan for development of the coastal zone. Without the later promise in the CZMA of some measure of influence over federal activities affecting their coastal zones, the states had far less incentive to participate in the CZMA or to surrender any of their control through the process of consultation and accommodation required to obtain approval of a coastal zone management plan. And without some means to assure comprehensive planning and review of all significant actions affecting the coastal zone, regardless of where they originate, Congress would have been unable to achieve its stated purpose of pursuing the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). The CZMA, in short, can only be understood as a *mutual* accommodation between the states and the federal government to secure the larger goal of comprehensive management of the coastal zone. In this context, petitioners' arguments about "federal paramountcy" based on ownership have no place.[14]

Petitioners' exhortations about the need to assure "federal paramountcy" also misstate the burden imposed by Congress on the federal agencies through Section 307(c)(1). Although petitioners repeatedly invoke the spectre of a state veto over federal leasing plans, U.S. Br. 26; *see* WOGA Br. 25, 45, it must again be remembered that the coastal plans are developed in accordance with

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[14] Petitioners' argument about undiluted federal authority rests in part upon the view that Section 307(e) of the CZMA, 16 U.S.C. § 1456(e), was explicitly intended to free federal agencies from the consistency requirement of Section 307(c)(1) by confirming the division of authority spelled out in the "1953 Compromise." *See* WOGA Br. 39; U.S. Br. 26. Petitioners offer neither logic nor legislative history to support their expansive reading of Section 307(e), which was specifically rejected by the National Oceanic and Atmospheric Administration (NOAA) in promulgating its regulations under the statute. NOAA determined that Section 307(e) was not intended to affect federal agencies' obligations under Section 307(c)(1). 44 Fed. Reg. 37,146 (1979).

federal standards and approved only after full review by all affected federal agencies. Thus, even if Section 307(c)(1) did confer a veto, it would arise from a conflict between one federal program (OCS leasing) and another federal program (Coastal Zone Management), not from the whim of an individual state. But, in any event, Section 307(c)(1) does not confer a veto over OCS leasing: the statute requires that the federal government conform to state plans "to the maximum extent practicable," 16 U.S.C. § 1456(c)(1), a requirement that current regulations interpret to allow an override of state plans where other federal laws so require.[15] Although WOGA apparently believes that this standard is insufficient to guarantee the necessary "federal paramountcy" over the Outer Continental Shelf, *see* WOGA Br. 19, the proper course is to ask Congress to change it, rather than to refuse to make consistency determinations at all.[16]

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[15] We agree with California that the Ninth Circuit should not have addressed this issue in the absence of any determination of consistency or inconsistency by the Secretary.

[16] The Secretary's quarrel with this balance of authority warrants even less scrutiny. In substance, the Secretary argues that because the federal agencies have never understood Section 307(c)(1) to apply to leasing, the federal agencies failed to consider the federal interest in the siting of energy facilities during the approval process for state management plans. *See* U.S. Br. 17, 25. Reduced to its essentials, this argument apparently asks this Court to misinterpret Section 307(c)(1) in order to accommodate a prior misinterpretation by the Secretary, an unappetizing request on its face. The argument is particularly inappropriate in this case, since both the Justice Department and NOAA have consistently warned Interior of its error. *See* Letter, April 20, 1979, from Office of Legal Counsel, Department of Justice, Joint App. 35; Memorandum, March 23, 1979, from General Counsel, NOAA, *id.* at 48. Moreover, the state plans submitted to the federal agencies for approval were required by the CZMA to include plans for the siting of energy facilities. 16 U.S.C. § 1455(c)(8). The Secretary could thus have failed to address this question only by consciously ignoring key elements of every state plan.

B. Section 19 of the OCSLA

Petitioners also maintain that the recent amendments to the OCSLA, permitting states to make "recommendations" concerning proposed lease sales, were intended by Congress to set the outer boundary of state involvement in federal leasing activities. This argument is unpersuasive for several reasons. First, it wrongly exalts the goal of increased oil and gas production at the expense of other equally prominent goals of the OCSLA. Second, it misapprehends the differences in scope and emphasis between Section 307(c)(1) of the CZMA and Section 19 of the OCSLA.

Although the OCSLA undeniably was intended "to result in expedited exploration and development" of the Outer Continental Shelf, 43 U.S.C. § 1802(1), that was by no means the only purpose. On the contrary, the clear message of the OCSLA is that accelerated development of oil and gas resources is not to be achieved at the expense of other natural resources. It is an express purpose of the Act, therefore, "to balance orderly energy resource development with protection of human, marine, and coastal environments." 43 U.S.C. § 1802(2)(B). In its statement of policy, Congress further recognized that development of offshore resources must be "subject to environmental safeguards." 43 U.S.C. § 1332(3). The Act is replete with provisions that require sensitivity to environmental concerns. *See, e.g.*, 43 U.S.C. § 1334(a)(1); 43 U.S.C. § 1344(a)(1); 43 U.S.C. § 1346. The OCSLA thus provides no basis for inferring that environmental concerns should be given short shrift.

The Act also makes clear that Congress intended to increase, rather than diminish, the role of state governments in the planning and operating of offshore activities. Another express purpose of the 1978 amendments to the OCSLA was to provide coastal states "an opportunity to participate in policy and planning decisions relating to management of the Outer Continental Shelf." 43 U.S.C. § 1802(b). Unlike the CZMA, which limited

state influence over the OCS to federal actions that also directly affected the coastal zone, the OCSLA provided states a direct voice in federal decisions regarding oil and gas development on the Outer Continental Shelf, whatever their effect on the coastal zone might be.[17]

The role provided to the states under the OCSLA is tailored to its purpose to expand state participation into certain federal decisions involving the Outer Continental Shelf. Thus, unlike the CZMA, both states and officials of local governments are permitted to comment upon proposed leasing plans under the OCSLA. 43 U.S.C. § 1345. Moreover, the substance of the recommendations is unrestricted. A governor may complain about all leasing, even if it can be carried out without significant environmental damage, or the bidding systems to be used, or the division of proceeds from drainage tracts. At the same time, the effect of these recommendations is quite limited. The Secretary may disregard them if, in his discretion, he finds that they do not provide "for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c)-(d).

By contrast, state influence over federal activities directly affecting the coastal zone, as provided by the CZMA, is at once more narrow but more substantial. State influence is limited to a consistency review based on a management plan that has been subjected to federal scrutiny and approval to ensure that national interests have been accounted for. Because the plan *already* pro-

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[17] Although WOGA seems to suggest that application of state coastal programs to OCS development is controlled by the OCSLA, the suggestion is patently incorrect. Even the provisions conceded by WOGA to require consistency were in place several years before the OCSLA was amended. The effect of the OCSLA was not to enlarge or reduce the requirements of the CZMA but to leave them intact. *See* page 26, *infra*. It is well recognized, of course, that repeals by implication are not favored. *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974).

vides for a "reasonable balance" between national and local interests, the responsibility of the federal government to the states is a heavier one. Individual federal agencies may not make their own assessment of the national interest but must conform their activities to the plan to the maximum extent practicable.

While the CZMA and the OCSLA thus plainly address related concerns, the different burdens that each imposes on the federal government are entirely appropriate to their distinct purposes. Indeed, in enacting the OCSLA amendments in 1978, Congress made crystal clear its intent not to disturb the consistency requirement of Section 307(c)(1) governing lease sales. The House Report accompanying Section 19 of the OCSLA states:

> The Committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan.

H.R. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added). Congress manifested this intent in the statute itself, where it provided specifically that "nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ." 43 U.S.C. § 1866(a).[18]

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[18] The Department of Justice, in its 1979 opinion, likewise relied upon the savings clause and legislative history of the OCSLA to conclude that Section 19 was not intended to replace consistency

C. Section 307(c)(3)(B) of the CZMA

Lacking any legislative history of Section 307(c)(1) to support their position, petitioners rely instead on the subsequent legislative history of another section, Section 307(c)(3)(B), to argue that Congress disavowed the need for consistency determinations at the lease-sale stage. WOGA Br. 40-42; U.S. Br. 31-35. According to petitioners, the fact that Congress in 1976 declined to add the word "lease" to the provisions requiring consistency reviews by private parties must mean that federal activities were excluded by Congress in passing Section 307(c)(1) in 1972. The argument is without merit.

To begin with, the deletion of the word "lease" from proposed Section 307(c)(3) cannot support the negative pregnant attributed to it. In light of the language and purpose of Section 307(c)(1), the ultimate deletion of this language may be read quite easily to indicate a congressional belief that adequate coverage was already provided by that earlier section. Because even petitioners acknowledge that the language was withdrawn to allow further study, WOGA Br. 41; U.S. Br. 32; *see* 122 Cong. Rec. 6128 (1976), it is entirely logical to assume that Congress found a need for *additional* consistency review only with respect to plans subsequently submitted by les-

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review of lease sales under Section 307(c)(1). *See* Department of Justice Opinion, Joint App. 44-45.

Although WOGA somehow finds this legislative history to be a "meager indication of congressional intent," WOGA Br. 26 n.19, that response is a peculiar one. First, there is little reason to suppose that views about the limitations of Section 19 of the OCSLA (to which WOGA points) were meant to amend *sub silentio* the provisions of the CZMA, especially when Congress expressly disavowed any such intention. Second, the recognition by WOGA that *some* lease sales are meant to fall within Section 307(c)(1) flatly contradicts their earlier point that such application would be inconsistent with the Tidelands Compromise.

sees. The lessees, of course, are not subject to the provisions of Section 307(c)(1).[19]

This argument also obscures the essential distinction between Sections 307(c)(1) and 307(c)(3). Although Congress was amending the provision relating to lessees (307(c)(3)), it would have been senseless to require lessees to make the initial consistency determination because, at the key time when tracts are selected, there are no lessees. Indeed, as the Secretary notes (U.S. Br. 32), Interior expressed concern at the time that a lease applicant simply could not carry out such an obligation. The logical solution, therefore, was to have Interior itself make the determination, as the Senate Committee apparently desired. S. Rep. No. 94-277, 94th Cong., 1st Sess. 19-20 (1975). But the obligations of *federal* officials were, as they always had been, covered by (c)(1), and amendment of (c)(3) to apply to the Secretary would have turned the statute on its head. Thus, the eventual decision not to subject the Secretary to the wrong provision of Section 307 hardly should be held to mean that he was exempt from the right one as well.[20]

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[19] The Secretary suggests, U.S. Br. 31, that the debate over the proposed amendments to the CZMA marked the first time Congress considered applying the consistency requirement in any fashion to oil and gas development, and that, therefore, the requirements added to Section 307(c)(3)(B) constitute the only applicable provisions. In fact, the debate in the House makes clear that Congress assumed the consistency provisions of the original act governed OCS oil and gas development regardless of whether Section 307(c)(3) was amended to include the term "lease." 122 Cong. Rec. 6112 (1976) (Remarks of Rep. Du Pont); *id.* at 6120 (Remarks of Rep. Hughes).

[20] The legislative history provides no support for petitioners' suggestion that the proposed amendment to Section 307(c)(3) was withdrawn because of a general dearth of information necessary to conduct a consistency review at the leasing stage. U.S. Br. 32-34; WOGA Br. 40-42. Rather, the Conference Report shows clearly that Congress felt that review of exploration and development plans under Section 307(c)(3)(B) would satisfy the need "for complete information, on a timely basis, about details of *the oil industry's*

Finally, it is evident that petitioners' argument proves too much. Although petitioners assert that the 1976 amendments to the CZMA demonstrate congressional intent "not to make leases subject to CZMA consistency," WOGA Br. 42, at other times they concede that various activities associated with the leasing stage would be subject to the consistency requirement of Section 307(c)(1). *Id.* at 26 n.19; U.S. Br. 37, 43. The two views are wholly incompatible.

Sections 307(c)(1) and 307(c)(3), properly read together, provide a sequential system of review to assure that activities affecting the coastal zone conform to state plans. In the early stages, the activities are federal, and are subject to the consistency requirement of Section 307(c)(1). After individual tracts are leased, the initiative for further action passes to the lessees, whose obligations are governed by Section 307(c)(3). This sequential scheme of review both recognizes that the identity of the responsible parties and the specificity of plans change over time, and provides continuing scrutiny to assure that consistency is maintained. But Congress has never said, or even suggested, that the existence of later stages of review obviates the need for earlier review as well.

It is thus not surprising that in 1980 Congress rejected the very argument now put forward by petitioners. While specifically addressing the question whether the 1976 amendments were intended to eliminate consistency review of lease sales under Section 307(c)(1), both the relevant House and Senate committees made clear that the Secretary must make leasing activities consistent with applicable coastal plans. The House Committee thus

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offshore plans." H.R. Rep. No. 1298, 94th Cong., 2d Sess. 30 (1976) (emphasis added). As we have sought to stress, however, decisions made by the Secretary regarding a lease sale have important consequences for the coastal zone wholly apart from the particular plans of each individual lessee. It is to the effect of those actions that Section 307(c)(1) is addressed.

stated flatly that the amendments to Section 307(c)(3) "did not alter Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980). Similarly, the Senate Report, after reviewing the legislative history of the 1976 amendment, reaffirmed that "[t]he Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307 (c)(1)." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Whatever petitioners may wish, none of the provisions relied upon relieve the Secretary of his obligations to make a consistency review under Section 307(c)(1). Respect for that obligation is essential to proper management of the coastal zone, and the Secretary should be required to honor it.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit construing the terms "directly affecting" in Section 307(c)(1) of the Coastal Zone Management Act of 1972 should be affirmed.

Respectfully submitted,

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